UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ROUNDY'S INC.,

Petitioner,

Case No. 10-3921

v.

NATIONAL LABOR RELATIONS BOARD and MILWAUKEE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO

CERTIFICATE OF SERVICE

The undersigned certifies that on the 19th day of January 2011, she mailed the REPLY BRIEF OF THE CHARGING PARTY via U.S. mail upon:

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UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

In the Matter of:

ROUNDY'S INC.,

Respondent,

and **Case 30-CA-17185-1**

MILWAUKEE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO,

Charging Party.

REPLY BRIEF OF THE CHARGING PARTY

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ATTORNEYS FOR MILWAUKEE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO

I. Introduction.

Relying directly or indirectly upon a footnote in the Supreme Court's decision in *Sears v. San Diego County Dist. of Carpenters*, 436 U.S. 180 n. 42 (1978), which was not intended by the Court as a holding on how §7 rights must be interpreted in the future, Roundy's along with a number of the amici curiae attempted to diminish the strength of the employees' §7 right, through their chosen bargaining representative, to protest contractors who pay sub-standard wages and benefits. However, protesting the payment of sub-standard wages and benefits, which undermine both employees' right to receive area standard wages and benefits and their job security, is central to the employees' right, through their already chosen §7 bargaining representative, to engage in concerted activities for their mutual aid and protection.

Even if the Board finds that the Council's area standards activities against Roundy's were by non-employees, Board law is clear that an employer cannot discriminate against the nonemployees' §7 right to protest on its property, when its objection to the nonemployees' protest was based upon its disagreement with the message of the protest. Various courts of appeals agree with the Board that an employer cannot discriminate against union solicitation based on its hostility to the union's §7 protected message. Once Roundy's permitted other groups to appeal to its customers for support on its property, it cannot prohibit the Council from appealing to the same customers based upon its hostility to the Council's message.

II. Argument.

1. The Employees Have a Strong §7 Right, Through the Council, to Protest Roundy's Hiring of Substandard Contractors On Its Projects.

The record in the case at bar showed that Roundy's had the right of final

approval of the hiring of sub-contractors, and that it was permitted to select subcontractors that did not submit the lowest bid. (GCX 23(g), 31(e)) Roundy's therefore was responsible for its decision to hire the lowest bidding subcontractor, regardless of whether said subcontractor paid area standard wages and benefits.

The Council protested Roundy's selection of sub-standard subcontractors for its projects on behalf of employees who have already exercised their §7 right to choose the Council as their bargaining representative. Contractors paying area standard wages and benefits have a more difficult time competing for bids, if their bids are undercut on price because other contractors can pay less to their employees. Employees represented by the Council face a loss of employment if employers such as Roundy's continue to award work to contractors paying sub-standard wages and benefits. Contractors paying area standard wages and benefits may become more reluctant to continue to offer compensation at that level to their employees, if they lose jobs because their bids are based upon the payment of area standard wages and benefits. The employees represented by the Council therefore have a compelling §7 right to protest Roundy's hiring of contractors paying sub-standard wages and benefits to protect their hard-won area standard wages and benefits, as well as their job security. *O'Neil's Markets v. NLRB*, 95 F. 3d 733, 735 n. 1 (8th Cir. 1996); *Giant Food Markets v. NLRB*, 633 F. 2d 18, 23 n. 11 (6th Cir. 1980) (There is a legitimate §7 interest to protect employment standards from the unfair competitive advantage enjoyed by an employer paying wages and benefits below the area standard). The strength of the §7 right is not diminished by the fact that the employees are employed by employers other than the one at the site of protest, or that the employees have chosen to act through their §7

representative. *Eastex Corp. v. NLRB*, 437 U.S. 556, 565 (1978); *Golden Stevedoring Co.*, 335 NLRB 410, 415 (2001).

Roundy's and a number of the amicus' arguments to the contrary rely upon footnote 42 of the Supreme Court's *Sears* decision. *See* 436 U.S. at 205 n. 42. The cases cited by Roundy's and the amicus include *UFCW Local 880 v. NLRB*, 74 F. 3d 292, 299 (D.C. Cir. 1996) (Relying solely upon *Sears*); *Be-Lo Stores v. NLRB*, 126 F. 3d 268, 284 (4th Cir. 1997) (Relying upon *UFCW Local 880*); and *Federated Stores*, 294 NLRB 650, 652 (1989) (Relying solely upon *Sears*). However, the footnote in *Sears* was dicta since the decision in *Sears* did not turn on the strength of the §7 right to engage in area standards picketing. Footnote 42 of the *Sears* opinion therefore cannot be read as a requirement of how the Board must define the strength of the §7 right to engage in area standards activities in the future. *Sears*, 436 U.S. at 211 (Blackmun, concurring); *Giant Food Markets*, 633 F. 2d at 24 n. 13. Rather, since area standards activities are conducted by employees through their §7 representative, they are protected by §7 as activities by employees for their own mutual aid and protection. The Board's decision should therefore recognize the strength of the employees' §7 right, through their bargaining representative, to protest employers' decisions to hire contractors paying sub-standard wages and benefits on their projects.

2. An Employer Cannot Discriminate between Non-Employee Non-Business Related Access to Its Property Based Upon Its Disagreement with the Message of the Non Employees' Appeal.

Even if the area standards activities of the Council were conducted by non-employees, the Council's activities enjoyed substantial §7 protection when they were conducted on behalf of employees for the employees' mutual aid and protection. As the

Supreme Court held in *Hudgens v. NLRB*, 124 U.S. 507, 522 (1976), once a person is rightfully on employer property, the employer's control over the types of activities that the person may engage in implicates its management interest, rather than its property right.[1] The principle applies to a non-employee who is permitted onto employer property to conduct activities unrelated to the employer's business. *D'Alessadro's*, 292 NLRB 81, 84 (1988) (By permitting a wide range of non-business related solicitations, employer showed that it had no objections to the presence of non-customers on its property); *Gallup American Coal Co.*, 32 NLRB 823, 829 (1941) (Regulation of the painting of union signs on rocks on employer property does not implicate the employer's property interest, when it already permitted other parties to paint non-business related signs on similar rocks).

Employees represented by the Council have an affirmative right, through the Council, to protest Roundy's use of contractors paying sub-standard wages and benefits. *Guard Publishing Co.*, 351 NLRB 110, 129 (2009). Once Roundy's interfered with the Council's handbilling, it must advance a substantial business justification for the interference. *Caesar's Palace*, 336 NLRB 271, 272 n. 6 (2001). Roundy's exercise of its management interest to interfere with Council handbilling similarly must be justified by a substantial business justification. The objection cannot be to the very presence of the Council on its property, when the employer has permitted other non-customers on its property for purposes unrelated to its business.

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[1] The Board should reject Roundy's suggestion that it need not have a property or management interest, before it interfered with Council handbilling. *Lechmere v. NLRB*, 502 U.S. 527, 538 (1992) was based upon finding the locus of accommodation between §7 rights and property rights. There is no need to engage in any accommodation or balancing when the employer does not have a sufficient property interest to exclude anyone from its property. *See Indio Grocery Outlet*, 323 NLRB No. 196 (1997) (There is no conflict between §7 rights and property rights when the employer lacked a sufficient property interest to exclude anyone from its property).

The Board has long taken the position that the business justification cannot the employer objection to the message of the union appeal. *D'Alessandro's*, 292 NLRB at 94 (§8(a)(1) violation to discriminate against union solicitation because of disagreement with union message); *Container Corp. of America*, 244 NLRB 318 n. 2 (1979) (Unlawful discrimination to remove employee posting, solely because the employer found the posting distasteful). Indeed, once an employer is permitted to distinguish between appeals to customers on its property on the ground that union-related appeals are bad for business, the employer can declare that all union related activities are bad for business, and render its employees' right to directly or indirectly engage in activities on its property for their mutual aid and protection a nullity. *See Lucile Salter v. NLRB*, 97 F. 3d 583, 590-591 (D.C. Cir. 1996) (§7 would be eviscerated if employer can distinguish between union solicitation and non-employees selling products unrelated to the employer's business). Moreover, the business justification must be the one that the employer actually relied upon, at the time that it interfered with the Council's handbilling. *Guard Publishing Co.*, 571 F. 3d 53, 60 (D.C. Cir. 2009).

The requirement of a substantial business justification permits the employer to make time and place restrictions on nonemployee solicitations that protect both the employer's management interest and the safety of employees and protesters. For example, a hospital may prohibit area standards protests in its patient care areas, while a grocery store may prohibit area standards activities in areas of its store where the activities would block aisles, or expose the protesters to dangerous equipment (unless it permitted non-§7 protected activities at the same locations). At the same time, employers may not prohibit handbilling in its parking lots, where the same patient care

and safety concerns are not applicable. The approach suggested by the Council therefore permits the accommodation of both the employees' right to engage in §7 activities to protect their hard won area standard wages and benefits and the employer's management interest.

Contrary to Roundy's suggestion, none of the prior cases decided by the Board changed any of the above principles. *Emerson Electric*, 187 NLRB 294, 299 (1970) and *Hammory Mfg. Corp.*, 265 NLRB 57 n. 4 (1982) merely held that an employer may prohibit its employees from engaging in union solicitations during working hours, at the same time that it permitted other employees to engage in a small amount of beneficent acts during work hours. The cases therefore are distinguishable from the case of an employer who waived its property interest by permitting a wide range of non-employee non-business related solicitations on its property. [2] Similarly, *Teletube Holdings*, 342 NLRB 924, 930 (2004) and *Farm Fresh*, 326 NLRB 997, 1000 (1998) merely stand for the proposition that an employer may prohibit union solicitations while permitting non-employees access for business related reasons, such as customers coming to its cafeteria to eat or a food vendor coming onto its property to sell food to its employees. The cases do not permit the employer to discriminate between union solicitations and non-union solicitations unrelated to its business. Roundy's has failed to site to any Board case permitting discrimination between union solicitation and wide ranging non-

[2] The Council joins SEIU in urging the Board to no longer apply the isolated beneficent acts exception to the prohibition of discrimination between union and non-union solicitations in future cases. The cases that the Board derived the exception from dealt with employee solicitations during work time, which is fundamentally distinguishable from solicitations by employees and non-employees while off-duty. *See Restaurant Corp. v. NLRB*, 827 F. 2d 799, 806 (D.C. Cir. 1987). Once an employer permits non-customers on its property for non-business related purposes, it makes clear that it's objection is to the activity conducted by the union on its property, rather than the mere presence of the union on its property. At that point, it would be appropriate for the Board to require the employer to demonstrate a non-discriminatory business justification for its interference with protected union activity. Eliminating the isolated beneficent acts exception would also eliminate the concern of several amicus that the exception creates a vague standard, as to when an employer is permitted to interfere with union solicitations.

business related solicitations by non-employees.

The proposition that Roundy's could not discriminate against Council handbilling on the ground that its message urged a consumer boycott of Roundy's is supported by Seventh Circuit precedent. The Seventh Circuit has held that once an employer permits any employee appeals to induce group action, it must permit all employee appeals for group action. *Fleming Co. v. NLRB*, 349 F. 3d 968, 975 (7th Cir. 2003) (Employer can remove union organizing materials from its bulletin boards, only because it did not permit its employees to post anything to induce employees to support any clubs or committees); *Guardian Industries v. NLRB*, 49 F. 3d 617, 621 (7th Cir. 1995) (Tolerating all but union solicitation is discrimination by anyone's definition). In *Guardian*, the Court held that the Board to adopt a rule that prohibits discrimination between meeting announcements of union and non-union organizations. *See* 49 F. 3d at 621-622. *See also Four B Corp. v. NLRB*, 163 F. 3d 1177 (10th Cir. 1998) (Employer cannot discriminate between union and charitable solicitations because of its hostility towards the union solicitation).

Similarly, once Roundy's permitted non-employees to solicit customer support in its parking lot on a subject unrelated to its business, it cannot interfere with the Council soliciting the same customer support at the same location, without pointing to a business justification that is unrelated to its disagreement with the message of the Council's solicitation. Roundy's cannot point to a legitimate business justification to preclude the Council from handbilling on its property, when it has permitted a wide range of controversial messages (such as an environmental group, a political candidate, and an anti-Walmart campaign) and non-controversial non-business related appeals to

its customers at the same location.

Roundy's interference with, and discrimination against Council handbilling was motivated by its disagreement with the Council's §7 protected message, a motivation that is unlawful. *NLRB v. Stowe Spinning Co.*, 336 U.S. 226, 230 (1949). The Board should infer that the employer had a unlawful motive for interfering with §7 activities, when it cannot advance a real and legitimate business justification for the interference. *Guard Publishing*, 571 U.S. at 60 (Infer employee was disciplined for sending a union related email, when the only justifications advanced by the employer for its interference with the employee's §7 protected activities were post hoc rationalizations).

The approaches taken by the Second and the Sixth Circuit should be rejected because they would permit employers to interfere with §7 activities, solely because of their hostility towards those activities. *See Salmon Run Shopping Center v. NLRB*, 534 F. 3d 108. 117 (2nd Cir. 2008); *Cleveland Real Estate Partners v. NLRB,* 95 F. 3d 457, 465 (6th Cir. 1996). The Second Circuit directly contradicted the Supreme Court's teachings in *Stowe Spinning*, when it held that a mall operator's motivation for interfering with §7 activities was *irrelevant* to analyzing whether the interference violated §8(a)(1) of the Act. *See* 534 F. 2d at 116-117. Under the approaches of the Second and Sixth Circuit the Board would never reach the issue of an employer's motivation for interfering with §7 activity, since an employer can avoid liability by simply showing that it has not permitted other unions or non-union groups to communicate to its customers on the same subject. The Board should continue to inquire into the employer's motivation for interfering with §7 activity by requiring the employer to demonstrate a legitimate business justification for its discrimination between union and non-union solicitations.

Finally, a rule requiring the employer to open its property to non-employee non-business related solicitations on a non-discriminatory manner would not raise First Amendment concerns. *Hurley v. Irish American Gay Group*, 515 U.S. 557, 566 (1995) is distinguishable. The Court held that a speaker cannot be forced to change the message of its own speech through the forced inclusion of a group in the speaker's parade. In contrast, in the case of a union's area standards campaign, the employer is not engaged in speech at all. Similarly, *Carey v. Brown*, 447 U.S. 455 (1980) held that a law generally cannot prohibit some speech while allowing others, because of the content of the speech. In contrast, the National Labor Relations Act does not prohibit or limit non-labor related speech, at the same time that it protects the exercise of §7 rights.[3] Indeed, the same First Amendment arguments could apply to Babcock's holding that an employer may be required to open up its property for union solicitations when its employees are otherwise inaccessible.

Once an employer permits any non-employee non-business related solicitations on its property, it must advance a legitimate business justification for its tolerance of other solicitation, at the same time that it interfered with §7 protected activity. The business justification cannot be disagreement with the §7 protected activity's message. If the employer cannot advance a legitimate business justification, the Board should conclude that the discrimination was unlawfully motivated by the employer's hostility towards the §7 protected activity. Roundy's violated §8(a)(1) of the Act by interfering with the employees' §7 activities, through their bargaining representative the Council,

[3] Contrast to the suggestion of one amicus brief, *Lloyd Corp v. Tanner*, 407 U.S. 551, 568 (1972) did not hold that requiring the employer to open up its property would amount to a taking. The Court merely cited to the Fifth Amendment's takings clause, without any analysis as to whether requiring the employer to open up its property to permit limited solicitations, which would have little interference with the employer's enjoyment of its property, would amount to a taking.

solely because of its hostility to the employees' area standards message.

Dated this 21th day of January, 2011.

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